No. 17-71

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* SAN JUAN COUNTY, UTAH IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

San Juan County[1] encompasses over 5.2 million acres as the largest county in the State of Utah, and is larger than several states. More than 80% of the land in San Juan County is owned or managed by the United States of America, and just 406,000 acres (8%)[2] of the county's land is in private ownership. This leaves very little acreage for private use and development, or local government taxation. Most of the private land in San Juan County lies in a corridor between the Colorado state line on the east and Highway 191 on the west. These lands, like the majority of the private land in San Juan County, are primarily used for family farms and ranches that are the mainstay of the county's rural economy.

In 2014, the U.S. Fish and Wildlife Service ("Service") promulgated two companion regulations under the Endangered Species Act ("ESA"). The first listed the Gunnison sage-grouse as a threatened species and is not at issue here. The second designated 1.4 million acres of occupied and unoccupied critical habitat in Colorado and San Juan County, Utah. *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Gunnison Sage-Grouse; Final

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than this *amicus curiae* made a monetary contribution toward the preparation or submission of this brief.

[2] www.nrcs.usda.gov/, search "San Juan Resource Area", last visited on 4/24/2018.

Rule, 79 Fed. Reg. 69311 (Nov. 20, 2014). In the Monticello-Dove Creek Unit, which includes part of San Juan County, the Service designated more than twice as much unoccupied habitat (236,000 acres) as occupied habitat (107,000 acres). 79 Fed. Reg. at 69338. Despite the vast areas of adjacent federal lands, 86% of the Monticello-Dove Creek Unit is private land. *Id.* at 69339.

As it now stands, roughly 35% of the private land in San Juan County is designated as critical habitat for the Gunnison sage-grouse, including tens of thousands of acres of unoccupied critical habitat on private land. 79 Fed. Reg. at 69357 (copy of Map Gunnison Sage-grouse Critical Habitat attached as Appendix 1). The vast majority of the private land now designated as unoccupied critical habitat is cultivated farmland that does not, and will not, serve as habitat for the Gunnison sage-grouse. In San Juan County, there are enormous areas of federal land – with sagebrush – to the north and south of the unoccupied private land that the Service designated. *Id.* The Service's abuse of its authority to designate unoccupied critical habitat on uninhabitable private land did not end with the dusky gopher frog.

San Juan County is now a party in an ongoing lawsuit challenging the Service's unoccupied critical habitat designation for the Gunnison sage-grouse. *See Center for Biological Diversity, et al. v. United States Fish and Wildlife Service, et al.*, Civil No. 1:15-cv-0130-CMA-STV (consolidated) (D. Colo.). The case is in the merits briefing stage and the issues raised include

the Service's improper statutory interpretation and designation of "unoccupied" critical habitat on private land, and whether the Service abused its discretion when it chose not to exclude the private farmland from the designation of unoccupied critical habitat. Thus, San Juan County has a unique interest to present and the Court's decision in this matter will be of consequence beyond this case.

SUMMARY OF ARGUMENT

The ESA requires the Service to designate "critical habitat" for a species determined to be threatened or endangered. The Service's designation of unoccupied critical habitat on private land without habitat is arbitrary, capricious and beyond statutory right. As a matter of plain language statutory construction, the land designated must provide "habitat" for it to be either critical or habitat for a species. No deference is due to an agency interpretation of a statute that is contrary to its plain language. If the species cannot live on the land and there is no reasonable expectation that it ever could, the Service's action in designating an area as critical habitat essential to the species is arbitrary, capricious, beyond statutory right and should be set aside.

Additionally, the Service's decision not to exclude an area upon weighing the benefits is subject to judicial review. Courts are capable of reviewing the costs and benefits and economic impacts for abuse of

discretion. The ESA provides meaningful standards for judicial review and a court may properly decide whether the Service abused its discretion.

In this case, the dusky gopher frog cannot live on the private Unit 1 lands that the Service designated as unoccupied critical habitat "essential" to the conservation of the species. Similarly, the Gunnison sage-grouse cannot live on the private farms the Service designated as unoccupied critical habitat in San Juan County. The Service's abuse of its authority under the ESA should be reversed.

ARGUMENT

San Juan County, as *Amicus Curiae*, does not seek to repeat or duplicate the legal issues and arguments presented, but to inform the Court of other circumstances and ongoing litigation that may be affected by this Court's decision. Weyerhaeuser Company's Brief for Petitioner ("Pet. Br.") explains how the Service's erroneous interpretation of the ESA resulted in the designation of the private Unit 1 land as critical habitat "essential" to the conservation of the species, even though the land is uninhabitable by the dusky gopher frog. *Id.* at 2-3. If the Service moves frogs there, they will die.

The Service erred because it refuses to acknowledge that "[c]ritical habitat must first be habitat." *Id.* at 4. Of the three elements of dusky gopher frog habitat, the "primary constituent elements" of its

habitat, the Unit 1 land has only one – ephemeral ponds. Pet. Br. 12. Nevertheless, the Service proceeded to designate the Unit 1 lands as "essential" for the frogs even though the other "elements" of their habitat were absent. One of three elements was, apparently, good enough to clear the high bar of "essential" habitat.

The Service employed the same flawed statutory interpretation and logic in San Juan County. The first element for the Gunnison sage-grouse habitat is "[e]xtensive sagebrush landscapes." 79 Fed. Reg. at 69354; *see also id.* at 69322 (requires large, interconnected expanses of sagebrush). The private land designated as unoccupied critical habitat in San Juan County is predominantly agricultural land, not sagebrush landscapes. One of the Service's own peer reviewers noted that many of the areas in San Juan County "may not contain suitable habitat." 79 Fed. Reg. at 69316. The Service responded: "Unoccupied habitat does not need to contain the [primary constituent elements], the standard is instead 'essential for the conservation of the species.'" *Id.* So it is that the Service can designate an area as "essential" critical habitat even though the land does not contain the species' habitat.

The Service designated tens of thousands of acres of private land in San Juan County as unoccupied critical habitat for the Gunnison sage-grouse. The Service did so even though most of the land is uninhabitable by the grouse and has no viable chance to become habitat for the species. In designating the private farmland as unoccupied habitat, the Service acknowledged

the disconnect between habitat and the land it was designating. "Unoccupied lands are designated here because they are 'essential for the conservation of the species' and these areas do not stop at land ownership boundaries." 79 Fed. Reg. at 69321. "We recognize that in areas with a high proportion of private ownership and with more intensive land uses (such as agriculture), the conservation of these populations will be more difficult than in less developed areas." *Id.*

The carefully crafted administrative language, used for the dusky gopher frog and the Gunnison sage-grouse, admits that the Service does not control the uses of private land, but hopes to have others change how they use their land. "Our landscape level approach used in this critical habitat designation generally does not consider land ownership." 79 Fed. Reg. at 69321. Given that there are no frogs living there and the private landowners would be freed from the undisputed burdens of the critical habitat designation, the simple fact is that the relief Petitioner requests will aid the landowners and will not harm the dusky gopher frog. Granting relief to Petitioner may equally serve to benefit the private landowners in San Juan County, without harming the Gunnison sage-grouse.

I. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES THE DESIGNATED LAND TO ACTUALLY BE HABITAT.

Congress did not authorize the Service to designate random land or water for the conservation of an endangered species. Rather, it authorized the agency

to designate "habitat." "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Court should not defer to the Service's interpretation of its unoccupied habitat authority when it conflicts with the plain language and intent of the ESA.

Critical habitat under the ESA, by definition, includes only the "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). The "physical or biological features" that satisfy the ESA's requirements are termed Primary Constituent Elements ("PCE"). 50 C.F.R. § 424.14(b)(5). PCEs must be "found" on occupied land before that land can be eligible for critical habitat designation. 16 U.S.C. § 1532(5)(A)(i). "That PCEs must be 'found' on an area is a prerequisite to designation of that area as critical habitat." *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 122 (D.D.C. 2004). The Service is prohibited from over-designating habitat and must instead "mount[ ] the proper effort to ensure that PCEs do exist on designated lands." *Id.* at 122-23. "The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation." *Id.*

Unoccupied lands must provide more than just "critical habitat" – they must provide critical habitat that is "*essential* for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). The plain language of the statute requires that unoccupied land be both "critical" and "essential" for the conservation of the species.

The Service is not free to designate acres for the sake of acres. The plain language of the statute requires that unoccupied areas of critical habitat must be 1) habitat suitable for the species, 2) critical, which is something more than general or potential, and 3) essential, being necessary. With these congressional words of limitation in mind, it is impossible to say that uninhabitable land in Louisiana is essential, critical or even habitat for the dusky gopher frog.

II. THE SERVICE'S REVIEW OF THE BENEFITS OF INCLUDING OR EXCLUDING AN AREA IS SUBJECT TO JUDICIAL REVIEW.

Section 4(b)(2) of the ESA requires the Service to "designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). If the benefits of excluding an area from designation outweigh the benefits of including it as critical habitat, the Service may exclude it from

designation if doing so would not result in the listed species' extinction. *Id.*

As a general matter, final agency action is subject to judicial review under the Administrative Procedure Act. *See* 5 U.S.C. §§ 551 *et seq.* In limited circumstances, agency actions are so discretionary that judicial review is improper. These unreviewable "committed to agency discretion" actions arise where there is "no meaningful standard against which to judge the agency's exercise of discretion." *Markle Interests, L.L.C.*, 827 F.3d 452, 473 (5th Cir. 2016) (citation and internal quotation marks omitted). The panel below decided that the Service's decision not to exclude Unit 1 was unreviewable. *Id.* at 474.

Given that the decision whether to exclude an area requires an economic and benefits analysis and the weighing of costs and benefits, there are meaningful standards that may be reviewed for abuse of discretion under the APA. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997). For example, the Service was able to quantify and determine the impact to Unit 1, but was unable to explain any benefits of the action other than indecipherable "biological terms." Pet. Br. 52. The regulations clarify that the designation is to be made "after taking into consideration the probable economic and other impacts." 50 C.F.R. § 424.12(a). If the Service cannot explain its consideration of the required factors, its action should be declared arbitrary, capricious and an abuse of discretion.

CONCLUSION

For the foregoing reasons, San Juan County respectfully requests the Court to reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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April 2018

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